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*Federal Public Sector  
Labour Relations and  
Employment Board Act and  
Federal Public Sector  
Labour Relations Act*



Before a panel of the  
Federal Public Sector  
Labour Relations and  
Employment Board

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BETWEEN

**CHANTAL NADEAU**

Complainant

and

**DEPUTY MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT**

Respondent

and

**OTHER PARTIES**

Indexed as

*Nadeau v. Deputy Minister of Employment and Social Development*

In the matter of a complaint of abuse of authority under paragraph 77(1)(a) of the *Public Service Employment Act*

**Before:** Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Sylvain Archambault

**For the Respondent:** Pierre-Marc Champagne

**For the Public Service Commission: Mylène Brackenridge and Louise Bard**

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Heard at Québec, Québec,  
June 20 and 21, 2018.

(FPSLREB Translation)

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## REASONS FOR DECISION

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### **I. Introduction**

1 The complainant, Chantal Nadeau, applied for a team leader position, classified at the PM-03 group and level, with the Processing and Payment Services Branch of Economic and Social Development Canada (“the respondent” or ESDC) in Québec, Quebec (appointment process number 2015-CSD-IA-QUE-29736; “the appointment process at issue”).

2 She was eliminated from the appointment process on the grounds that she did not satisfy the “Engagement” competency. To be selected, she had to obtain a final pass mark of 60% (weighted) for the Situational Judgment Test, commonly known as the “Dolmen”, and for the interview. The Dolmen result was worth 40% of the final mark, while the interview was worth 60%. She obtained 83% on the Dolmen and 40% on the interview, which led to a weighted final mark of 57%.

3 On April 4, 2017, the complainant filed a complaint under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, s. 12, 13; *PSEA*), in which she alleged that the respondent, ESDC’s deputy minister, abused its authority in the application of merit by refusing to provide appropriate accommodation at the interview stage. She did not challenge the appointments of the appointees. She alleged that she was discriminated against on a prohibited ground of discrimination, namely, disability. Thus, she alleged that she was not assessed properly during the interview for the Engagement competency.

4 The complainant argued that the lack of accommodation during the appointment process at issue affected her ESDC career. She has been denied an opportunity for an indeterminate appointment to a team leader position classified PM-03 in Old Age Security since 2016. With her expertise in that area, she is convinced that she would have qualified and that she would have been added to the pool of qualified candidates. Since early 2018, several PM-03 team leader positions have been staffed from the pool created during the 2015-CSD-IA-QUE-29736 appointment process.

5 Given that the complainant alleged discrimination as defined by the *Canadian*

*Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*), the Canadian Human Rights Commission was informed, as required under s. 78 of the *PSEA*. On June 27, 2017, it indicated that it did not intend to make any submissions on this issue.

6 The respondent denied the allegations. It argued that the selection board consulted the complainant before the Dolmen test and the interview to put an accommodation in place to respond to her needs and that she consented to all the proposed measures. The *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service* and the *Guide for Assessing Persons with Disabilities* (simplified HTML version) state that consulting a specialist to determine the appropriate accommodation is necessary only when the candidate or employee does not know the required accommodation. That was not so for the complainant.

7 The Public Service Commission (PSC) participated in the hearing and submitted evidence on the role of the Personnel Psychology Centre (PPC). It made written submissions on its role and its policies but did not take a position on the merits of the complaint.

8 For the reasons set out later, I find that the complaint is founded. The evidence adduced leads to the conclusion that abuse of authority occurred in the application of merit since the respondent refused to exercise its discretion by adopting a policy that fettered its ability to deal with an individual case with an open mind, which resulted in discrimination against the complainant.

## **II. Background**

9 Since 2009, the complainant has been working at ESDC, formerly Service Canada, at the Benefits Delivery Service Branch as a clerk classified at the CR-04 group and level. Since January 2018, she has been a team leader on an acting basis classified at the PM-03 group and level. This is the same as the position at issue, but it resulted from a different appointment process. From 2014 to April 2016, she held a PM-03 team leader position through a talent management program.

10 With respect to her advancement and professional development, the complainant participated in several appointment processes for management and

operational expertise positions. In February 2016, she applied for a team leader position at ESDC's Processing and Payment Services Branch in Québec ("the appointment process at issue"). The purpose of that process was to fill positions at the Québec Processing Centre and the Québec Old Age Security Processing Centre and to create a pool of qualified candidates to staff similar positions in the region.

**11** In autumn 2016, she also participated in an appointment process aimed at creating a pool of qualified candidates and offering positions for advancing in the public service ("the second process"). Candidates were asked to identify the positions for which they wished to apply; if they satisfied the required qualifications and experience, their applications were selected.

**12** On November 25, 2016, the selection board for the position at issue informed the complainant that it would not proceed with her application in the appointment process at issue because she did not satisfy the Engagement competency.

**13** The complainant was called for the test and interview on May 18, 2016. At that time, her accommodation request was only for her adjustment disorder. According to her doctor's note dated May 13, 2016, she simply needed more time to complete the written test. The medical certificate did not mention any accommodation for the interview.

**14** On May 24, 2016, the selection board for the position at issue emailed the complainant about the accommodation, indicating that she would have more time to complete the written test and proposing a series of additional measures, including possibility writing the test in a separate room, writing her answers in the test booklet, taking 5- to 10-minute breaks if necessary, and using a ruler and highlighters. In addition, the selection board asked her to complete the accommodation request form entitled, "Appendix 2: Questionnaires to gather information on functional limitations - Information on Functional Limitations Associated with Learning Disabilities or Attention Deficit Hyperactivity Disorder (ADHD)" ("Appendix 2") and to return it as soon as possible with her response about the offered accommodation. According to her recollection, a form consenting to disclose medical information was attached to the Appendix 2. However, that document was not adduced in evidence, which the

respondent did not challenge.

**15** On May 26, 2016, the complainant informed the selection board that the proposed accommodation was perfectly suitable for her. She notified that board that her sick leave had been extended to June 1, 2016. According to her, the proposed accommodation was valid for the month of June and had been determined based on the condition she was in before her mother's death. She thought that she would be able to write the test the week of June 6, 2016. The selection board did not propose any accommodation for the interview. During this same period, several difficult events arose in her personal life. She again requested that her assessment be postponed. ESDC understood.

**16** The complainant was on approved sick leave until her progressive return to work in October 2016. On October 6, 2016, she asked the selection board to wait until she had begun working four days a week before scheduling the test. She needed the time so that she could resume her duties. She feared that she would fail the test due to trouble concentrating. She did not inform the respondent of that problem. The selection board accepted her request.

**17** On November 3, 2016, she completed "Appendix 3 - Consent to release information form" ("Appendix 3") for the second process. Appendix 3 gave the respondent permission, as part of the second process, to contact the complainant's doctor to find the accommodation that would address her functional limitations.

**18** In addition to an adjustment disorder, the complainant indicated that she had a concentration problem. She emphasized that she had to reread the same document several times, highlight it, and annotate its text. She added that she would be assessed for a dyslexia-dysgraphia disorder. She also mentioned that she suffered from episodic depression and that she was seeing a psychologist.

**19** The respondent was aware that the complainant required a separate room for the test, as well as additional preparation time. It also knew that she would require a 15-minute break between the assessment stages; it also allowed her to use a ruler and to write directly on the questionnaire.

**20** On November 8, 2016, the selection board for the position at issue emailed the complainant to confirm the proposed accommodation. These were the same measures as in May and dealt only with her adjustment disorder. That same day, she replied that the accommodation for the written test was very suitable for her. The accommodation implemented was based on the information that she had provided in Appendix 2.

**21** On November 9, 2016, to implement the required accommodation for the second process, the PSC contacted representatives of the selection board to obtain the “[translation] Information provided by a health professional for accommodation purposes” form. The PPC is responsible for implementing accommodation for PSC tests. The complainant was scheduled to write the “General Competency Test: Level 2 (GCT2-314)” and “Middle Management Situational Exercise (MMSE-840)”.

**22** According to Dr. David Forster, a psychologist at the PSC, when a department asks a candidate to take a PSC test for an appointment process, it must consult the PPC for any accommodation. After reviewing the complainant’s file, the selection board for the second process determined that more information was needed to plan the accommodation.

**23** The complainant was called to the test and interview on November 21, 2016, as part of the appointment process at issue. On the day in question, the selection board gave her 50% more time to prepare for the interview; that is, 90 minutes instead of 60, followed by a short break. Like the other candidates, she then had 30 minutes to make her presentation to the selection board members, followed by a 1-hour lunch break. At the end of the interview, she took the French written communication test. Her only break was between the end of her preparation and her presentation to the selection board members, and it was less than 10 minutes. She adduced no evidence alleging that she requested a longer break and that it was denied.

**24** Two members of the selection board, including Manon St-Pierre, and the complainant participated in the telephone interview. Her break was shortened because the selection board members were already on the telephone. As a result, during the interview, she was unable to think, and she ran out of time. She mentioned that there



was no indication of time in the interview room and that she had mentioned before the interview began that she did not see a clock.

**25** According to the complainant, Marie Larocque, who was in charge of conducting the interview, told her that she did not see the importance of viewing the time. However, it was important for the complainant because she did not want to run out of time. She remembered mentioning the time issue to Ms. Larocque during her preparation. It completely disrupted her. She did not discuss the matter with the selection board members on the phone, although she did recall mentioning it. She said that she was confused and that nothing worked for her. She had just returned from sick leave and was still having trouble putting her thoughts in order.

**26** The complainant emphasized that she was extremely uncomfortable during the interview but that she was unable to explain why. She did not mention the lack of a clock to the selection board. She added that she did not realize that the medication could affect her way of expressing herself orally. She also said that she was not the same person today as she was as of the interview. People who suffer from depression are in denial, which she did not realize at the time. She was certain that the selection board members had communicated with her doctor.

**27** In cross-examination, the complainant acknowledged that the preparation and interview took place on the morning of November 21, 2016, and that the written communication test took place in the afternoon of the same day. She confirmed that she received a one-hour lunch break. She did not know whether the other candidates had been accommodated in the same way.

**28** She was aware that if she suffered a physical or psychological indisposition before or after the test that could affect her performance, it was her responsibility to inform Ms. Larocque, and that she would not be penalized. If necessary, the test or interview would have been postponed. However, if she chose to begin or continue the test despite her indisposition, she had to accept the results and consequences.

**29** The respondent summoned Ms. Larocque to testify. She had been a

project advisor since November 2016 and a team leader of integrity services officers. She was classified at the PM-03 group and level. She was responsible for supervising the administration and preparation of the complainant's interview during the appointment process at issue. She was responsible for ensuring that the instructions received from the selection board were followed.

**30** Ms. Larocque did not specifically remember this case. As she recalled, she confirmed the complainant's identity and the appointment process. She did not recall any particular request from the complainant. They discussed the requests and instructions received by email, and nothing more. Ms. Larocque was aware that there was no clock in that room. Usually, when there is no clock, she lends her watch to candidates who request it, which the complainant did not do. Ms. Larocque said that she was used to accommodation requests because of her experience with the PSC.

**31** As of the test and the interview for the process at issue, Ms. St-Pierre was a PM-03 team leader. She was part of the selection board along with Magalie Ouellette, Stéphane Mercier, and Danielle Lambert. She participated in the screening process and with developing the assessment tools. She was also involved with administering the Dolmen test and the interview, marking the test, checking references, participating in informal discussions, and formulating answers to candidates' questions.

**32** The only two assessment tools used to evaluate the Engagement competency were the Dolmen test and the interview. That test gives candidates few opportunities to stand out. The interview gave them the opportunity to demonstrate their ability to do the work. The 60/40 weighing for both tests had been planned in the spring, before the tests were administered.

**33** Ms. St-Pierre became aware of the complainant after speaking with her colleague, Mr. Mercier, who was in charge of responding to requests from Québec candidates. He told her about the complainant's accommodation requests and the request to postpone the test due to her sick leave. After a discussion with Ms. Lambert, an accommodation was proposed to the complainant, and the test was postponed.

**34** The proposed accommodation was discussed with the selection board.

The proposed options were those that were normally offered to accommodate adjustment disorders and corresponded to the complainant's medical certificate. In addition, the complainant benefitted from additional measures, such as the use of a highlighter and a ruler, along with additional breaks.

**35** On May 24, 2016, the selection board emailed the complainant to confirm the proposed accommodation and asked her to complete a related form, which asked for more details about her condition and the required accommodation.

**36** At the complainant's request, the test and the interview were postponed until she returned from sick leave in October 2016. The selection board agreed to wait until she returned to a four-day workweek before scheduling the Dolmen test and the interview.

**37** According to Ms. St-Pierre, the selection board had enough information to propose the accommodation. And, since the complainant agreed with the proposed measures and no standardized PSC test was involved, it was able to proceed without having to contact her doctor. She confirmed that the form included consent in case additional information was required.

**38** The interview was conducted on November 21, 2016, by telephone. Ms. Larocque was on-site to administer it and had specific instructions to follow. She asked the complainant to complete the interview first, to accommodate the board members who had travelled to the city.

**39** For the interview, the selection board applied the accommodation based on Appendix 2. Its members took turns asking questions and recorded the answers; it did not follow up on the answers supplied. Candidates had control over their answers and were responsible for their time. The selection board then marked the answers.

**40** Ms. St-Pierre did not remember the interview, only that the complainant was nervous and stressed. The interview involved a situational exercise, namely, a workplace problem. The purpose of the question was to assess Engagement as a competency. Candidates had to account for the operational plan and develop an action plan to address the human resources situation. The selection board expected

references to the organizational chart and the people to consult.

**41** The three selection board members had been involved with developing the assessment grid that was used. It contained the list of expected answers. The grid was used to record each candidate's answers. The complainant's responses were incomplete and too general. She referred to what needed to be done rather than explaining in concrete terms what she would put in place. She made good points but failed to cover them in great detail. She did not adequately address the human resources aspect or the consultation with partners and stakeholders and did not mention that individual meetings might be required. There were several positive points, but due to the weaknesses with the action plan and things to put in place, she did not meet the Engagement competency requirement.

**42** On November 22, 2016, the selection board for the second process sent a second message to the complainant to obtain the form completed by her doctor. She replied that her doctor had received the document on November 11, 2016, and that she hoped he would complete it that week.

**43** On November 25, 2016, the selection board for the position at issue notified the complainant that it would not proceed with her candidacy for the PM-03 team leader position because she did not satisfy all the competencies, notably, Engagement. She requested an informal meeting with the selection board to understand why she had failed and how to improve for subsequent processes. After two requests, a meeting was finally scheduled for December 19, 2016.

**44** On November 29, 2016, eight days after the interview for the appointment process at issue, the complainant's family doctor completed the form required for the second process. He indicated that she suffered from two conditions, namely, permanent adjustment disorder and episodic depression disorder. He emphasized that the medication affected her performance and that she had to take it constantly.

**45** The Doctor indicated that based on the medication, the ideal time to assess the complainant was in the morning. The medication had a moderate impact on her performance on written tests, in interviews, and in interactive assessments. Her

short-term memory, energy levels, organizational capacity, information processing speed, and reaction time were also moderately affected. Clearly, it was the same with respect to her ability to control her stress and anxiety.

**46** During the second process, based on that information, ESDC's Human Resources branch sent two emails to the complainant to inform her of the accommodation that the PSC and the PPC recommended for the General Competency Test: Level 2 and the Middle Management Situational Exercise.

**47** For the two tests in the second process, the PPC recommended administering the test in a separate and quiet room; 50% more time to complete it; short 5- to 10-minute breaks as needed or every 30 minutes; the use of highlighters, a ruler, a calculator, and scrap paper; and possibly writing in the test book.

**48** In cross-examination, the complainant acknowledged that at the time of her interview and her test for the appointment at issue, on November 21, 2016, the respondent did not have the additional information from her doctor that had been provided in the second process. It was given to the selection board for the second process on December 5, 2016.

**49** The informal meeting was held on December 19, 2016, by teleconference. The complainant explained that she had returned from several months of sick leave, that she had just lost her mother, and that in her view, the accommodation had been insufficient. On November 8, 2016, she had not been in a position to confirm that the board's proposed accommodation was sufficient. She relied on the selection board to determine the appropriate measures. It disagreed about what happened during the interview with respect to the break and the time. She asked it to reassess her and to adjust her mark, considering the new information.

**50** After the meeting, the complainant was distressed. She had her heart set on the PM-03 team leader position. She did not understand what had happened and could not believe that she had failed. She had held that position on an acting basis for the previous 18 months through the talent management program. She found herself in her substantive position as a program and services delivery clerk, classified CR-04, at

the Processing and Payment Services Branch.

**51** On February 27, 2017, she emailed the selection board, asking for a response to her review request dated December 19, 2016. During the same period, she participated in other selection processes in which she had to complete the Appendix 3 form. In response to the information provided, the PPC's accommodation expert at the PSC determined that additional information was needed from her doctor. She explained that she had mentioned her mother's death and that an adjustment disorder was not the only condition she suffered from. Due to her lack of knowledge, she had not assessed the impact of her mother's death when she completed Appendix 2 for the appointment process.

**52** As for the informal discussion, Ms. St-Pierre gave her leads for improving her performance, including using "I" more when speaking and providing better descriptions of the measures she would put in place. The complainant thought that it would be sufficient to review her test with Ms. St-Pierre, but ultimately, she requested a review of her file. She notified the selection board that it was unaware of certain things, and she requested a reassessment. Ms. St-Pierre consulted a human resources advisor, Manon Pellerin.

**53** On March 22, 2017, the selection board replied that before the informal meeting, it had reviewed her file to ensure that her mark was fair and that no errors had been made, after which it confirmed that her mark would not change. With respect to the accommodation granted to her for the Dolmen and the interview, it had been approved by Ms. Lambert, the manager in charge of the process, and Ms. Pellerin, who had worked with the selection board to maximize the complainant's chances of success. According to them, the information that the complainant provided had been sufficiently detailed to allow them to propose a suitable accommodation and that contacting the doctor had been unnecessary.

**54** The selection board also indicated that the complainant accepted its proposals and that she benefitted from accommodation at all steps of the assessment process. It indicated that a doctor's opinion was required only for certain types of assessment tools, such as standardized PSC tests or when using tools developed by

external companies. Finally, it informed the complainant that information brought to its attention after its assessment would not be considered retroactively.

**55** According to the human resources advisor, Ms. Pellerin, the selection board was under no obligation to consider factors that the complainant was unaware of as of the interview. The selection board then decided not to change the mark. Ms. St-Pierre explained that there was no latitude to change it. According to her, since it had not been a standardized PSC test, it had been unnecessary to involve the PSC's PPC in the accommodation process.

**56** According to page 10 of the *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service* and page 4 of the *Guide for Assessing Persons with Disabilities* (simplified HTML version), consulting an expert to determine appropriate an accommodation is necessary only when the candidate or employee does not know the measures required, which was not so for the complainant. Both her medical certificate and the information provided in the Appendix 2 form corresponded to standard measures for an adjustment disorder. Thus, the selection board did not consider it necessary to obtain additional information from her doctor.

**57** In cross-examination, Ms. St-Pierre stated that according to the human resources advisor, Ms. Pellerin, there was no obligation under accommodation policies to reconsider information that was unavailable to the complainant as of the interview.

**58** According to the complainant, the respondent had to contact her treating physician for all appointment processes. For the position at issue, the selection board did not request the same information as did the selection board for the second appointment process. She had been sure that it would seek the relevant information from her doctor. She mistakenly believed that the selection board for the position at issue would contact her doctor because she had authorized it to with the Appendix 2.

**59** As a result of the accommodation, the complainant's application was retained in the second appointment process. She did not challenge the accommodation that the respondent provided for that process. On the contrary, she emphasized that the same measures should have been implemented for the process at issue. Appendix 3

authorized the respondent to contact her doctor. She believed that it would contact her doctor in both processes. In cross-examination, it asked her for the difference between the accommodation offered in the process at issue and that offered in the second appointment process. She was unable to answer.

**60** In October 2017, following an external review, the complainant qualified for a team leader position, classified PM-03, at the Benefits Delivery Service Branch; her name was added to the pool of qualified candidates. Since it involved a review by an external firm, PSC policy required consulting the PPC for all accommodation requests. ESDC contacted the PSC and the PPC when it developed the accommodation.

**61** According to the complainant, she was the only candidate who met all work experience requirements, including supervising Old Age Security staff. The appointees satisfied all the experience requirements except for the supervisory one. ESDC consolidated all the PM-03 team leader positions and filled several positions at that level from the pool of qualified candidates.

**62** On April 4, 2017, the complainant made her complaint against ESDC, alleging that following the informal discussion, it refused to exercise its discretion and review her individual case to provide her with the necessary accommodation to enable to her to fully participate in the appointment process at issue. The additional information that she shared with ESDC about her health was discovered only after the interview and the test were done. She had been reluctant to make a complaint because she feared for her career advancement, given her specific condition.

### **III. The issue**

**63** The complainant argued that an abuse of authority occurred in the application of merit with respect to the assessment of the Engagement competency.

**64** As of the interview, she was unaware that she had both a permanent adjustment disorder and an episodic depression disorder and that two separate conditions were present. She was unaware of the impact of her medication on her performance on written tests, interviews, and interactive assessments. She found out



only after the interview. The accommodation was inadequate, which directly affected the grading.

**65** Therefore, the issue is the following: Did the respondent abuse its authority in the complainant's assessment when she informed it of her health problem, which was discovered after the interview?

#### **IV. Analysis**

**A. Issue I: Did the respondent abuse its authority in the complainant's assessment when she informed it of her health problem, which was discovered after the interview?**

**66** To address this issue, first, the concepts of fettered discretion and discrimination must be considered since they are both directly related to this case.

**67** Section 77 of the *PSEA* states that an unsuccessful candidate in the area of selection for an advertised internal appointment process may make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of an abuse of authority.

**68** As noted in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 71, an abuse of authority can include an action, omission, or error that Parliament could not have intended as part of the discretion granted to persons with delegated staffing authority.

**69** Abuse of authority is a matter of degree. To find that there was abuse of authority, the error or omission must have been so serious that it could not have been inherent in the manager's delegated discretion (for example, see *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26 at para. 32). This includes violating a complainant's human rights. The complainant must meet this burden of proof on the balance of probabilities (see *Tibbs*, at para. 50).

#### **1. Discretion**

**70** One type of abuse of authority noted in *Tibbs* is when a delegate refuses to exercise his or her discretion by adopting a policy that fetters his or her ability to consider individual cases with an open mind.

**71** The concept of discretion was explained as follows in *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 12:

...

*[123] . . . It may be determined that a strict application of the guideline fetters the ability of the delegate to consider individual cases with an open mind.*

...

*[127] Moreover, in the context of the PSEA, where recourse is now focussed [sic] on the exercise of discretion in appointment processes, an assessment board should not refuse to exercise its discretion through strict application of a guideline which fetters its ability to assess each candidate with an open mind. Where the Tribunal determines that the assessment board has fettered its discretion in this way, it may find that the assessment board abused its authority.*

...

**72** Furthermore, under s. 80 of the *PSEA*, the Board may interpret and apply the *CHRA* when analyzing an abuse-of-authority complaint under s. 77 of the *PSEA*.

**73** It is not disputed that the complainant had medical problems that warranted putting an accommodation in place. She alleged that at the informal discussion stage, the respondent refused to consider the new information about her state of health as of the interview and the written communication test.

**74** The main purpose of an informal discussion is to allow candidates to discuss the reasons their candidacies were rejected as part of a process. If during the discussion it is discovered that an error was made in the candidate's assessment, the manager must take action to correct it (see *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46; and *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 3).

**75** As of the interview and the written communication test, the complainant knew that she had a permanent adjustment disorder. However, she was unaware that she had two disorders in that she also had episodic depression. She found out on

November 29, 2016, eight days after the interview and the written communication test were done. She said that she had benefitted from a different accommodation during the second appointment process with ESDC. She noted that the respondent was aware of the accommodation that according to her, had been suitable.

**76** Through the document that her doctor completed, Appendix 3, at the PSC's request as part of the second appointment process, and the document "[translation] Information provided by a health professional for accommodation purposes", she learned that the ideal time for an assessment was in the morning and that the medication she was taking moderately affected her performance on written tests, at interviews, and in interactive assessments. Her short-term memory, energy levels, organizational capacity, information processing speed, and reaction time were also moderately affected. Clearly, it was the same with respect to her ability to control her stress and anxiety.

**77** After she learned about those effects, the complainant informed the respondent of them at the informal discussion. She could not have sought accommodation for a disability that she did not know she had. The respondent refused to consider her individual case with an open mind. In fact, at the hearing, Ms. St-Pierre indicated that in Human Resources' opinion, the selection board had been under no obligation to consider factors that the complainant was unaware of as of the interview.

**78** Although the respondent accommodated the complainant's adjustment disorder, she also suffered from episodic depression, and the medication that she was taking as of the interview moderately affected her performance. Because she had been unaware of that impact, she had been unable to request accommodation. Furthermore, there appears to have been a lack of communication because she thought that the respondent had contacted her doctor to discuss an appropriate accommodation, which was not so. Thus, she agreed to the proposed accommodation, thinking that her doctor had recommended it.

**79** In this case, I am of the opinion that the respondent fettered its discretion because it failed to consider the complainant's individual case. It simply adopted a strict approach by stating that the information brought to the selection board's attention after

her assessment could not be considered retroactively. However, in light of the new information that she submitted, the respondent was obligated to consider it and then decide whether she should be reassessed, with a new accommodation. Stating that the information could not be considered retroactively did not demonstrate an open mind on the respondent's part.

**80** With respect to the discrimination issue, ss. 3(1) and 7 of the *CHRA* are relevant to this case and read as follows:

**3 (1)** *For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*

...

**7** *It is a discriminatory practice, directly or indirectly,*

...

**(b)** *in the course of employment, to differentiate adversely in relation to an employee,*

*on a prohibited ground of discrimination.*

**81** Disability is one of the prohibited grounds of discrimination listed in s. 3 of the *CHRA*. To establish that discrimination occurred, a complainant has the burden of first adducing *prima facie* evidence of it.

**82** The Supreme Court of Canada established the test in *Ont. Human Rights Comm. v. Simpson-Sears*, [1985] 2 S.C.R. 536, as follows:

...

*... A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer....*

...

**83** In *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, Judge Abella described the initial burden for establishing a discriminatory distinction or *prima facie* discrimination. At paragraph 49, she notes that not every distinction is discriminatory and that membership in a protected group alone does not guarantee access to a human-rights remedy. The onus is on the complainant to meet the initial burden of establishing the link between membership in that group and the arbitrariness of the disadvantaging criterion or conduct that triggers the possibility of a remedy.

**84** As noted, the complainant had the onus of adducing sufficient *prima facie* evidence that discrimination occurred. To satisfy the *prima facie* test, she had to establish only that the alleged discrimination was one of the factors, not the only factor or even the main factor, in the respondent's decision to remove her from the appointment process (see *Holden v. Canadian National Railway Co.* (1991), 14 C.H.R.R. D/12 at para. 7 (C.A.)). In discrimination cases, the burden of proof is the balance of probabilities.

**85** The Board cannot consider the employer's response before determining whether *prima facie* evidence of discrimination has been established (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 22). If the complainant establishes a *prima facie* case of discrimination, the onus is then on the respondent to provide a reasonable explanation of its actions that is not discriminatory. Under s. 15 of the *CHRA*, an employer may respond to *prima facie* evidence of discrimination by establishing that its action was justified as a *bona fide* occupational requirement; this analysis includes assessing the reasonable accommodation up to the undue hardship threshold.

**86** According to the complainant's recollection, a form consenting to medical information disclosure was attached to Appendix 2, which the respondent did not challenge. She criticized the selection board for failing to contact her family doctor. She believed that the respondent had consulted her doctor to determine accommodation options.

**87** In addition, the complainant argued that the selection board should have consulted the PPC. She argued that the respondent discriminated by refusing to

consider the new information on her medical condition that she disclosed during the informal discussion and that as a result, there was discrimination and abuse of authority. She submitted that with proper accommodation, she would have passed and received an indeterminate appointment.

**88** According to the evidence submitted, the complainant established *prima facie* evidence of discrimination. The evidence established that she was unaware that she had an episodic depression order (a disability) as of the interview and that her medication affected her interactions. I find that the episodic depression disorder had an impact and that it was linked to why she failed the interview and was eliminated from the selection process. The respondent refused outright her request to be reassessed and accommodated.

**89** The respondent had the burden of proof to provide a reasonable explanation, not based on discrimination, for its decision not to consider the new information that the complainant provided during the informal discussion.

**90** Dr. Forster, PPC psychologist at the PSC, adduced evidence on the guidelines and policies that apply to accommodation in the context of an assessment in an appointment process. In this case, he noted that since the respondent had prepared the test and the interview, it was not a standardized PSC assessment tool, and that as a result, there was no need to consult the PPC. However, consultations may take place if the selection board finds that it could benefit from the PPC's expertise in implementing an accommodation.

**91** The respondent argued that the selection board provided accommodation based on the available information that the complainant provided before the interview. It considered the assessment tools used, the qualifications to be assessed, and the information that she provided. Furthermore, she accepted all the proposed measures and never requested accommodation for the interview.

**92** The respondent argued that it responded to the complainant's request with respect to her adjustment disorder and that she failed to inform the assessment board that the accommodation was insufficient. Consequently, the respondent concluded that

it was not required to take further action. The selection board concluded that it was unnecessary to contact her family doctor because it had enough information to accommodate her and that she had accepted all the proposed measures. It argued that she had not assumed her responsibilities with respect to accommodation, i.e., to inform it of her functional limitations with respect to the interviews.

**93** To support its argument, the respondent referred me to *Boivin v. President of the Canada Border Services Agency*, 2010 PSST 6. In that case, an interview included a question that required reading, and the former Public Service Staffing Tribunal (“the Tribunal”) found that because of the complainant’s visual impairment, there was *prima facie* discrimination. However, the employer had implemented all the required accommodations. In that case, like in this one, the complainant had not informed the respondent during the assessment that the accommodation was insufficient. The Tribunal stated the following:

...

*[133] The process of accommodation therefore, requires the communication and engagement of both parties. The steps that establish that the parties have met their obligations in the accommodation process are not immutable, nor can they be rigidly compartmentalized. This is precisely because of the need, at times, to fine-tune how the requirement for accommodation is met, and the need for dialogue and cooperation from both the respondent and the employee. The process of accommodation cannot always result in perfection, particularly when it is clear that the party who [sic] must address the request does not know that there is a problem.*

...

**94** In that case, the Tribunal found that the parties were required to act reasonably and to cooperate to find solutions to accommodation requests. If a problem arises with the accommodation process, then responsibility must be determined. The outcome of the complaint will depend on the answer to that question.

**95** Therefore, in this case, I must establish when the problem occurred in the process. This principle is well established in *Central Okanagan School District No. 23*

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*v. Renaud*, [1992] 2 S.C.R. 970, which states that reasonable accommodation is the responsibility not only of the employer but also of the employee and his or her bargaining agent, if any. The employer and the employee both have a role to play in ensuring that reasonable accommodation is provided, the employer by providing the accommodation, and the employee by providing necessary information and cooperating in the search for reasonable solutions.

**96** The evidence established that the complainant was unaware that she had an episodic depression disorder before she was interviewed for the position at issue. She found out afterward, on November 29, 2016, and informed the respondent during an informal discussion. She asked to be reassessed in light of this disability, ensuring an appropriate accommodation.

**97** It had not been possible for her to request accommodation earlier because she had been unaware of her state of health and the medication's impact on her interactions when she completed Appendix 2. Furthermore, she believed that the respondent would contact her doctor to determine an appropriate accommodation given that she had completed Appendix 3. Thus, the problem in the accommodation process occurred during the informal discussion, when she informed the respondent that she had just learned that she had episodic depression and therefore required accommodation for the interview. At that point, the accommodation process was triggered.

**98** The complete version of the *Guide for Assessing Persons with Disabilities* submitted by Dr. Forster contains a section on "mental health problems". Several examples of accommodation are provided, including individual sessions, additional time and breaks, and the flexible scheduling of assessment sessions. Furthermore, the guide clearly states that accommodation should be developed case by case and that the candidate's functional limitations, the assessment tool, and the qualification being assessed must be taken into account.

**99** The respondent refused to consider the complainant's request, stating the following: "[translation] Unfortunately, the information brought to the selection board's attention after your assessment cannot be considered retroactively."



**100** In *Boivin*, the complainant did not make an accommodation request for his visual impairment either during or after the interview. He did not follow the necessary steps to launch the process. The respondent even offered to reassess him once it became aware of the complaint before the Tribunal. But he refused that offer. Consequently, the Tribunal found that in the circumstances, he had failed to establish that he had been discriminated against based on his disability.

**101** The complainant never requested accommodation for her depression disorder at the interview because the doctor's note referred only to accommodation for written tests. In Appendix 2, dated November 3, 2016, she informed the selection board that she had been accommodated for her adjustment disorder during an appointment process for a PM-05 position at the interview and written test stages. The respondent argued that the accommodation for the second appointment process had been identical to that granted as part of the appointment process at issue. In cross-examination, she was unable to answer the respondent's question about the difference between the accommodations provided in the two processes.

**102** According to the complainant, the respondent showed discrimination when at the informal discussion stage, it refused to reassess her for her depression disorder. It is not disputed that she had medical problems that substantiated her accommodation request or that the respondent never ignored its duty to accommodate her adjustment disorder. She received and accepted all the accommodations for this disability that were proposed and granted.

**103** As for the interview, the respondent stated that if the accommodations provided for the process at issue and for the second process are compared, it effectively implemented the same accommodation. The one provided in the second process for the standardized tests was the same as that provided for the written communication test completed as part of the process at issue. Therefore, according to the respondent, it fulfilled its duty to accommodate. It stated that it did not consult the complainant's doctor or the PPC during the process at issue because it was not required to since it did not use a standardized PSC test.

**104** For comparison purposes, the following are the accommodations

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*Federal Public Sector Labour Relations and Employment Board Act and  
Public Service Employment Act*

implemented for the appointment process at issue and those developed for the second appointment process:

[Translation]

<p>Accommodation for the process at issue 2015-CSD-IA-QUE-29736</p> <p>(Based on the respondent's email dated November 8, 2016, and entitled, "[translation] Proposed accommodation".)</p>	<p>Accommodation for the second appointment process for standardized tests GCT2-314 and MMSE-840</p> <p>(According to the accommodation reports for the assessments prepared by the PPC on December 19, 2016.)</p>
<ul style="list-style-type: none"> <li>• <i>A separate room</i></li> <li>• <i>50% more preparation time, and a break between each part</i></li> <li>• <i>A ruler at your disposal</i></li> <li>• <i>Writing your answers directly in the test booklet</i></li> </ul> <p><i>It means the following when we apply it to our assessment:</i></p> <p><i>First part: Interview</i></p> <ul style="list-style-type: none"> <li>• <i>1.5 hours of preparation, followed by a break, if necessary (instead of the usual 1 hour)</i></li> <li>• <i>A maximum of 30 minutes for your presentation to the board members (no change)</i></li> </ul> <p><i>The usual break between the two parts of the assessment (your lunch break instead of the usual 15 minutes)</i></p> <p><i>Second part: Written communication test</i></p> <ul style="list-style-type: none"> <li>• <i>A maximum of 1.5 hours to complete the test (instead of 1 hour)</i></li> <li>• <i>Writing your answers directly in the test booklet (instead of on the answer sheet)</i></li> </ul> <p>The respondent's email dated November 14, 2016, noted the following, in addition to the measures already</p>	<p><b>SCHEDULE:</b> <i>It is recommended to administer one test per day in the morning or at the candidate's convenience.</i></p> <p><b>SEPARATE ROOM:</b> <i>The test will be conducted in an individual supervised session in a quiet, closed room free of noise from the lobby, adjacent offices, or any other activity near the examination room that may distract the candidate.</i></p> <p><b>TEST VERSION:</b> <i>The candidate will be assessed with the regular version printed in 12 pt. Arial.</i></p> <p><b>ANSWER FORMAT:</b> <i>The candidate may write her answers in the test booklet. Once the test is completed, the examiner will transcribe the answers on the regular answer sheet with the candidate present. The test booklet will be returned to the PPC to be destroyed.</i></p> <p><b>ADDITIONAL TIME:</b> <i>50% more time will be given to complete the test, either 180 instead of 120 minutes [for the GCT2-314 test] or 270 minutes instead of 180 minutes [for the MMSE-840 test].</i></p> <p><b>BREAKS:</b></p>

<p>mentioned on November 8, 2016:</p> <p><i>First part: Interview - 9:30 a.m.</i></p> <p><i>Other: The candidate may use a ruler, if necessary, for both parts of the assessment and may write directly in the test booklets with pencils and highlighters. We will ensure that the necessary materials are provided to the candidate.</i></p>	<p><i>The candidate may take short breaks (5 to 10 minutes) as needed (or every 30 minutes). During breaks, the candidate will not have access to the test material, and the timer should be stopped.</i></p> <p><b>OTHER:</b>  <i>The examiner will provide highlighters, a ruler, a calculator [only for the GCT2-314 test], and scrap paper. The candidate may write in the test booklet.</i></p>
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**105** Based on the documents entered into evidence, the assessments in the two appointment processes were different. The process at issue included a written test and an interview, while the second process included two standardized written tests, the GCT2-314 and MMSE-840. It does not appear that an interview was held. As a result, the accommodation for the second process was implemented only for written tests and not for interviews. Consequently, the assessment methods differed for the processes. The accommodation might have been different for the interview stage. For the position at issue, the complainant did not have more time than the other candidates did for the interview. She failed at the interview stage.

**106** Based on the evidence presented at the hearing, it is inaccurate to hold that the complainant was granted the same accommodation in both appointment processes, since the accommodation for the second process was only for written tests and not an interview. No evidence was adduced with respect to the accommodation provided for an interview in the second appointment process.

**107** Furthermore, the accommodation provided for the second process was based on all the complainant's functional limitations. However, the accommodation for the process at issue was based on her adjustment disorder alone and not the episodic depression disorder or the effects of the medication.

**108** As outlined in the *Guide for Assessing Persons with Disabilities*, accommodations must be determined based on each case, the functional limitations, and the assessment tool. In this case, the complainant had more time to prepare for the interview but not for her presentation to the selection board members. I cannot rule on

the accommodation required or whether it was necessary. Nevertheless, the respondent did not act on her accommodation request when she shared the new information at the informal discussion. The accommodation process had been triggered, and the respondent chose not to initiate it. Therefore, it failed to provide a reasonable explanation, other than on the basis of discrimination, to justify its decision in this case.

**109** On the facts, I find that abuse of authority occurred in the complainant's assessment. Not only did the respondent fetter its discretion when it refused to consider the new information she provided about her episodic depression disability and the impact that her medication could have on her interactions at the interview stage, but it also discriminated against her when it refused to act on her accommodation request.

### **B. Corrective measures**

**110** The Board's authority to order corrective measures is provided in ss. 80 and 81 of the *PSEA*. Under s. 81(1), the Board may order an appointment revoked or that it not be made and that any corrective measures be made that it considers appropriate in the circumstances. The corrective measures described in s. 81(2) of the *PSEA* include orders under ss. 53(2)(e) and 53(3) of the *CHRA*. Section 82 of the *PSEA* states that the Board may not order a respondent to make an appointment or to conduct a new appointment process.

**111** Under s. 53(2)(e), the Board may order a party found guilty of a discriminatory practice to compensate a victim who has endured pain and suffering from a discriminatory act up to a maximum of \$20 000. Section 53(3) provides for another maximum compensation payment of \$20 000 to the victim if the Board finds that the practice was wilful or reckless.

**112** The complainant asked to be reassessed, with an appropriate accommodation. She submitted that she would have obtained the position at issue with a proper accommodation. As a result, she seeks compensation for lost wages between March 13, 2017, and January 14, 2018, when she obtained the position on an acting basis classified PM-03, which represents approximately 10 months of wages, as well as a sum for the pain and suffering caused in this case. She did not seek compensation

under s. 53(3) of the *CHRA*.

**113** Since there is no evidence or guarantee that the complainant would have been appointed in the process at issue had she qualified, she did not establish that she is entitled to lost wages in his case. However, under s. 81(1), the Board may order that she be reassessed, with an appropriate accommodation.

**114** Although s. 53(2)(e) of the *CHRA* gives the Board the discretion to grant this remedy when a complaint is allowed, it must be exercised judiciously and in light of the evidence before it. See *Canadian Human Rights Commission v. Dumont*, 2002 FCT 1280 at para. 14.

**115** In this case, in support of her claim for compensation under s. 53(2)(e) of the *CHRA*, the complainant explained that she had held the PM-03 position close to her heart and that she felt humiliated when she returned to her substantive CR-04 position. She had held the PM-03 position on an acting basis for the prior 18 months under the talent management program. She stated that generally, she felt stressed and frustrated that she did not obtain the indeterminate position.

**116** Accordingly, I find that the complainant established that she was humiliated and stressed as a result of the selection board's refusal to reassess her. However, since she did not adduce additional evidence supporting her compensation claim, I find that it is warranted that she receive \$5000 in compensation for pain and suffering (s. 53(2)(e)).

**117** For all of the above reasons, the Board makes the following order:

**V. Order**

**118** The complaint is founded.

**119** Within 60 days of this decision, the respondent shall reassess the complainant with an appropriate accommodation, following consultation with her family doctor and the PPC, and taking into consideration that she has already passed the Dolmen and the written communication tests.

**120** If the complainant is deemed qualified in light of this reassessment, her name will be added to the pool of qualified candidates.

**121** Within 60 days of this decision, the respondent shall pay the complainant the sum of \$5000 for pain and suffering.

January 30, 2019.

FPSLREB Translation

**Chantal Homier-Nehmé,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**